STATE OF MICHIGAN

COURT OF APPEALS

KIMBERLY ELIZABETH RICHARDS, a/k/a KIMBERLY ELIZABETH CLARK, Plaintiff-Appellant, v MARK THOMAS SCHWEMIN, Defendant-Appellee.	UNPUBLISHED July 13, 2010 No. 294615 Marquette Circuit Court LC No. 09-047106-DC

Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

PER CURIAM.

Plaintiff Kimberly Elizabeth Richards, a/k/a Kimberly Elizabeth Clark, appeals as of right challenging the portion of a circuit court order that awarded defendant Mark Thomas Schwemin primary physical custody of the parties' son during the school year. We affirm.

Plaintiff and defendant, who never married, had a son together in May 2004. The parties shared a Marquette County dwelling from the time their son was three-months-old until he reached four years of age. In May 2008, after a period of unemployment, plaintiff accepted a temporary job in Wisconsin, and she returned home to Marquette County every weekend. In September 2008, plaintiff accepted permanent employment in Wisconsin. The parties' relationship deteriorated by the end of 2008, and early in 2009 they worked out a parenting time arrangement pursuant to which each had custody of the child for alternating weeks. The child was due to begin kindergarten in September 2009; although the parties agreed he would have to reside primarily with one parent or the other over the course of the school year, each of the parties wanted primary custody, which they sought in the circuit court.

The circuit court held a conference method hearing in August 2009, at which the court elicited testimony from the parties, invited further questioning by the parties' counsel, and offered the parties an opportunity to summarize their respective positions.[1] In deciding the

[1] Plaintiff does not specifically challenge on appeal the circuit court's conduct of the custody hearing in the conference method. Nonetheless, we note that the circuit court properly held the conference method hearing pursuant to the parties' informed stipulation. MCR 3.216(A);
(continued…)

custody dispute, the circuit court first noted that the child "clearly" had an established custodial environment with both parents. The circuit court observed, however, that the child's impending school enrollment "alone provides . . . clear and convincing evidence that we have to change that." Next, the court reviewed the change of residence factors identified in MCL 722.31(4), which it found "not so much at issue here." In conformity with MCL 722.25(1), the circuit court turned to an evaluation of the best interest factors in MCL 722.23.[2] The court deemed the parties

(…continued)

Watson v Watson, 204 Mich App 318, 320-321; 514 NW2d 533 (1994).

[2] According to MCL 722.23:

> As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:
>
> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> (f) The moral fitness of the parties involved.
>
> (g) The mental and physical health of the parties involved.
>
> (h) The home, school, and community record of the child.
>
> (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
>
> (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.
>
> (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(continued…)

equal with respect to factors (a), (b), (c), (e), (h), and (j), opined that factors (f), (g), and (i) did not apply in this case, and did not specifically mention factors (k) and (*l*), neither of which had any relevance to the parties' dispute. The court reasoned as follows that factor (d) dispositively favored defendant:

> The factor that I guess I think stands out to me is the one that does provide some difference between the parties, is factor [(d),] . . . the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity. For the last year or so, several months anyway, [the child] has gone back and forth, and it has been about 50-50 between the homes. I do think, though, that the evidence supports that the home in this area has been a stable and satisfactory home, and that because the philosophy in this area of the law is to maintain continuity when possible, I do find, based on the evidence that's offered in this record, that . . . [the child]'s best interests would be served by having him stay here with his dad during the school year. As I said, I'm satisfied that most of the evidence has nothing negative to say about mom. I think both parents believe that he'll be well cared for no matter where he is. But based on the law and the evidence in this record, my decision is that he stay here with dad during the school year.

Plaintiff initially challenges the circuit court's denial of her motion for reconsideration of its custody ruling. This Court reviews for an abuse of discretion a circuit court's ruling on a motion for reconsideration. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 629; 750 NW2d 228 (2008).

Here, we detect no abuse of discretion in the circuit court's denial of plaintiff's motion for reconsideration. Plaintiff emphasized in the motion that certain circumstances undercut the circuit court's heavy reliance on the fact that the "child had spent pretty much his entire life in the home occupied by his father in Marquette County." According to plaintiff, (1) defendant "is unable to maintain the monthly mortgage payments on his own without contribution from . . . Plaintiff," (2) "with . . . Defendant . . . unable to maintain the monthly mortgage payments or to qualify for a new mortgage in his name, only, the home currently occupied by . . . Defendant will likely be offered for sale in the immediate future," and (3) "in the recent past, . . . Defendant has informed . . . Plaintiff that should he ever be required to leave his current home, he would relocate to the family cottage in Alger County, thus removing the child from the environment in which the court felt the child would be most comfortable." In the circuit court's order denying reconsideration, it explained that plaintiff's expressed "concerns appear to address the possibility of future events, none of which, to the Court's knowledge, has actually happened at this time. Until such a time there is a change in circumstances or some other proper cause to revisit the Court's custody order, the existing order remains in effect." Contrary to plaintiff's contention, that defendant at the August 2009 hearing replied affirmatively to the circuit court's inquiry, "But do you agree that you needed to be a dual income family to make your ends meet[,]" does not equate to defendant's concession that he could no longer afford to pay the mortgage on the

(…continued)

> (*l*) Any other factor considered by the court to be relevant to a particular child custody dispute.

parties' formerly shared house. In summary, because plaintiff's motion for reconsideration presented only speculation grounded in a faulty premise, the circuit court's denial of the motion fell squarely within the principled range of outcomes, and thus did not amount to an abuse of discretion. *Woods*, 277 Mich App at 630.

Plaintiff next disputes two of the circuit court's best interest factor determinations.

> This Court must affirm all custody orders unless the trial court's findings of fact were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 876-877 (Brickley, J), 900 (Griffin, J); 526 NW2d 889 (1994). Thus, a trial court's findings regarding the existence of an established custodial environment and with respect to each factor regarding the best interest of a child under MCL 722.23 should be affirmed unless the evidence clearly preponderates in the opposite direction. *Fletcher*, *supra* at 879; *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). This Court will defer to the trial court's credibility determinations, and the trial court has discretion to accord differing weight to the best-interest factors. *Sinicropi v Mazurek*, 273 Mich App 149, 155, 184; 729 NW2d 256 (2006). The trial court's discretionary rulings, such as to whom to award custody, are reviewed for an abuse of discretion. *Fletcher*, *supra* at 879. An abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Id*. at 879-880, citing *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959). This standard continues to apply to a trial court's custody decision, which is entitled to the utmost level of deference. *Shulick v Richards*, 273 Mich App 320, 325; 729 NW2d 533 (2006). . . . [*Berger v Berger*, 277 Mich App 700, 705-706; 747 NW2d 336 (2008).]

Plaintiff criticizes the circuit court's assessment of factor (c), the "capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care." Plaintiff insists this factor should have favored her given that she traditionally made more money than defendant, had healthcare coverage for the child through her employer and her tribal affiliation, and she was about to move into a two-income household with her new husband. The testimony at the evidentiary hearing revealed that the parties at that time made nearly identical annual salaries, around $27,000, and plaintiff did not impugn in any respect at the hearing defendant's past or present capacity to supply the child with food and clothing. With respect to the child's healthcare, the parties did not dispute that defendant had taken the child to medical appointments in Marquette County whenever necessary, and that the child enjoyed good health. The hearing testimony also reflected that the child might qualify for health care coverage through either plaintiff's Wisconsin employer or through the MIChild program in Michigan, in which the child previously had been enrolled. In light of the testimony at the August 2009 hearing, we conclude that the evidence did not clearly preponderate against the circuit court's finding that factor (c) favored the parties' equally. *Berger*, 277 Mich App at 705.

Plaintiff also disputes the circuit court's evaluation of factor (d), "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." Plaintiff refers to matters outside the record, like a lawsuit purportedly initiated to

force either the sale of the parties' home or defendant's compensation of plaintiff, and a comment defendant allegedly made at some unspecified time concerning his potential relocation if he had to leave the parties' home. Even taking into account these matters, they deal solely with potential future events or concerns, not current circumstances. With respect to plaintiff's invocation of defendant's testimony that the parties needed dual incomes to maintain their shared home, defendant made this statement in the course of his explanation why maintaining plaintiff's apartment and the family home proved challenging when plaintiff first moved to Wisconsin. Defendant's answer may imply at some level that he would struggle with expenses on his own, but importantly, no evidence suggested that he had ever lacked, or imminently would lack, sufficient income to meet child care expenses. Concerning plaintiff's argument that a more structured environment at her house rendered it more stable, the hearing testimony supported that plaintiff did have a more precisely fashioned daily schedule established for the child's activities; however, the evidence does not reflect that plaintiff's home itself was measurably more stable than defendant's. Plaintiff finally avers that the child, who had been attending daycare in Wisconsin in alternating weeks at the time of the hearing, would enjoy a more consistent child care arrangement in Wisconsin, especially given the number of different child care providers used by defendant in Michigan. But defendant testified, and plaintiff did not rebut, that for at least the 1-1/2 years predating the hearing, during the days when defendant worked the child regularly had been cared for one day a week by defendant's sister and plaintiff's mother. Defendant's testimony reflected that he intended to continue a similar relative-placement arrangement when the child began attending school. In summary, the testimony showed continuity in the child care arrangement that defendant had in place for some time. We conclude that given the testimony at the custody hearing, the evidence did not clearly preponderate against the circuit court's finding that factor (d) favored defendant. *Berger*, 277 Mich App at 705.

Affirmed.

/s/ Jane E. Markey
/s/ Brian K. Zahra
/s/ Elizabeth L. Gleicher